No. 03-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

04-5323

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

Supreme Court U.S.
FILED
JUL 19 2004

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner LaRoyce Lathair Smith, by counsel, respectfully requests leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Smith has previously been granted leave to proceed *in forma pauperis* in the Texas Court of

JUL 21 2004

Criminal Appeals on direct appeal and during state habeas proceedings, as well as in the District Court of the Northern District of Texas. Nonetheless, as Smith seeks review of the decision of a state court, an affidavit of indigency is attached.

Wherefore, Petitioner asks the Court to grant him leave to proceed *in forma pauperis* in filing this petition for a writ of certiorari.

Respectfully submitted,

Jordan Steiker by Maurie Levin w/express permission

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LaRoyce Lathair Smith **Petitioner,** **vs.** **Doug Dretke, Director,** **Texas Department of Criminal** **Justice, Institutional Division** **Respondent.**	**CIVIL ACTION** **NO. _____**

DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, LaRoyce Lathair Smith, declare, depose, and say that I am the plaintiff in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to relief.

I further declare that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes __ No ✓

a. If you answered **YES**, state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

_____

b. If you answered **NO**, state the date of last employment and the amount of the salary and wages per month which you received.

1990 minimum wage car wash

_____

_____

2. Have you received, within the past 12 months, any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No ✓
b. Rent payments, interest or dividends? Yes ___ No ✓
c. Pensions, annuities or life insurance payments? Yes ___ No ✓
d. Gifts or inheritances? Yes ✓ No ___
e. Any other sources? Yes ___ No ✓

If you answered **YES** to any of the questions above describe each source of money and state the amount received from each during the past 12 months.

FRIENDS $600.00 - $800.00

3. Do you own cash, or do you have money in a checking or savings account, including any funds in prison accounts?

Yes ✓ No ___

If you answered **YES**, state the total value of the items owned.

Inmate trust fund SEE attached

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property, excluding ordinary household furnishings and clothing?

Yes ___ No ✓

If you answered **YES**, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support; state your relationship to those persons (father, mother, spouse, etc.); and indicate how much you contribute toward their support.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I declare under penalty of perjury that the foregoing is true and correct.

Signed this 16th day of July, 04.

Lakeya L. Smith
Signature of Plaintiff

I hereby certify that the plaintiff herein has the sum of $ 207.36 on account to his/her credit at the Polunsky Unit-TDCJ institution where he/she is confined.

I further certify that the plaintiff likewise has the following securities to his/her credit according to the records of said _____ institution:

CHRISTY PUTNAM
NOTARY PUBLIC STATE OF TEXAS
My Commission Expires: 01-27-2008

Notary without Bond

Authorized Officer of Institution

No. 03-____

IN THE

SUPREME COURT OF THE UNITED STATES

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LAROYCE LATHAIR SMITH,
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On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel for LaRoyce Lathair Smith, that on July 19, 2004, I caused the foregoing Motion for Leave to Proceed *in Forma Pauperis* to be served by U.S. mail on the Hon. Bill Hill, Dallas County District Attorney, Attn: Katherine Drew, Appellate Section, Office of the Dallas District Attorney, Frank Crowley Courts Building, 133 N. Industrial Blvd., Dallas, TX 75207, telephone 214-653-3625; and that all parties required to be served have been served.

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Counsel for LaRoyce Lathair Smith

No. 03-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

LAROYCE LATHAIR SMITH,

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STATE OF TEXAS,

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On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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Capital Case

QUESTIONS PRESENTED

I.

Can the decision of the Texas Court of Criminal Appeals denying Petitioner relief under *Penry v. Lynaugh*, 492 U.S.302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), because his mitigating evidence did not constitute a uniquely severe permanent handicap with a nexus to his crime survive this Court's intervening decision in *Tennard v. Cockrell*, 542 U.S. ---, 124 S. Ct. 2059 (2004)?

II.

Is *Penry II* satisfied by a nullification instruction that clearly informs jurors of the obligation to answer sentencing questions dishonestly in order to give effect to constitutionally relevant mitigating evidence?

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner LaRoyce Lathair Smith respectfully requests that the Court grant a writ of certiorari to review the decision of the Texas Court of Criminal Appeals in his capital proceeding.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Ex Parte LaRoyce Lathair Smith*, 123 S.W. 3d 407 (Tex. Crim. App. 2004). It is attached hereto as Appendix 1.

JURISDICTION

On April 21, 2004, the Texas Court of Criminal Appeals issued its opinion denying Mr. Smith's application for a writ of habeas corpus. *Ex Parte LaRoyce Lathair Smith*, 123 S.W. 3d 407 (Tex. Crim. App. 2004). No petition for rehearing was filed.

The Court has jurisdiction to review the decision of the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, "nor [shall] cruel and unusual punishments [be] inflicted," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

COURSE OF PROCEEDINGS BELOW

LaRoyce Lathair Smith was convicted of capital murder and sentenced to death in Dallas County, Texas, in June, 1991. The Texas Court of Criminal Appeals (CCA) affirmed his conviction and sentence in June, 1994. *Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994) (unpublished decision), *cert. denied*, 514 U.S. 1112 (1995). This decision denying Mr. Smith's direct appeal is attached as Appendix 2. Thereafter, Mr. Smith sought habeas corpus relief in the state courts. His first application for state habeas relief was dismissed as untimely, first in April, 1998, *Ex Parte Smith*, 1998 Tex. Crim. App. LEXIS 94, and finally in July, 1998, *Ex Parte Smith*, 977 S.W. 2d 310 (Tex. Crim. App. 1998). The Texas Court of Criminal Appeals subsequently authorized the filing of a subsequent application for habeas relief, and Mr. Smith again filed for habeas relief in the instant case in March, 2000. On April 5, 2001, the state trial court recommended that the application be denied, and the Texas Court of Criminal Appeal adopted that recommendation in *Ex Parte LaRoyce Lathair Smith*, 123 S.W. 3d 407 (Tex. Crim. App. 2004). It is that opinion denying state habeas relief that is before this Court.

STATEMENT OF THE CASE

A. Guilt-Innocence Phase of Mr. Smith's Trial

The guilt phase evidence established that Mr. Smith and his accomplices entered a Taco Bell restaurant with the intention of stealing money and that the store manager, Jennifer Soto, was killed in the course of that crime. Mr. Smith was convicted of the capital murder of Jennifer Soto.

Some critical mitigating evidence concerning Mr. Smith's mental deficiencies and difficult family background was introduced during the guilt phase of Mr. Smith's trial. Johnnie Mae Smith, Mr. Smith's mother, testified that Mr. Smith was a slow learner in school and underwent a great deal of testing. SF 28:129, 130.[1] He failed first grade and was in special education programs throughout school. SF 28:130. By the age of 18, Mr. Smith had reached only the 9th grade. SF 29:34. The crime was committed when Mr. Smith was 19 years old. SF 29:21.

Johnnie Mae Smith also testified about Mr. Smith's father, Leroy Smith. Leroy Smith had been to the penitentiary for robbery. SF 28:126. He was involved in a motorcycle gang, caroused with other women, and abused alcohol and drugs, especially crack cocaine. SF 28:134-135. Leroy Smith stole from his family to support his drug habit, SF 28:135-137, and this situation greatly disturbed all of the members of the family, including LaRoyce Smith. SF 28:138.

[1] References to the trial transcript, in Texas called the "statement of facts," are "SF" followed by the volume and page number of the statement of facts.

B. Penalty Phase of Mr. Smith's Trial

1. Testimony

The defense offered additional evidence of Smith's cognitive impairments and difficult background in the penalty phase of the trial. Alberta Pringle, records coordinator for the special education department for the Dallas Independent School District, testified that Mr. Smith had been identified at the earliest stages of his schooling as a slow learner with learning disabilities and speech handicaps. SF 32:17-42. Testing through the school district indicated that Mr. Smith's verbal I.Q. was 75 and full scale I.Q. was 78. SF. 32:33-34. A report prepared by Richard Adams, the director of health services for the Dallas independent School District, SF 32:23, concluded on the basis of Mr. Smith's history and physical exam that Mr. Smith's learning problems were possibly organic in nature. SF 32:28.

Various family and community members confirmed the turbulent home life caused by Mr. Smith's father. Reverend Samuel Nicks, Mr. Smith's pastor, testified that he was aware that Mr. Smith's father had stolen from his family to support his drug habit. SF 32:10-11. He also testified that such behavior has an especially devastating impact on adolescent children. SF. 32:11. Dorothy Faye Ellis, a good friend of the family, testified that Mr. Smith's family situation affected him greatly, especially the economic hardship wrought by his father's thefts. SF. 32:92-93.

2. Sentencing Instructions

Mr. Smith's jury was required to answer the same special issues on deliberateness and future dangerousness as were at issue in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*):

> 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Affirmative answers to both questions required imposition of the death sentence.

The jurors were also provided with a nullification instruction that they could disregard the content of the special issues if they believed that mitigating evidence -- including evidence with "no relationship to any of the Special Issues" -- led them to conclude "that the death penalty should not be imposed." The full nullification charge was as follows:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death,

then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

These instructions are attached as Appendix 3.

During the closing arguments on the punishment phase, the prosecution emphasized the jurors' obligation to answer the special issues truthfully. Reminding the jurors of voir dire, the prosecution insisted on honesty:

> Now, when we talked to you on voir dire, we talked to you about – and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

SF 33:20.

On voir dire, the prosecution repeatedly asked prospective jurors, including jurors who ultimately served, whether they could answer the special issues honestly and without attempting to achieve a particular sentence – life or death. For example, in the voir dire of Lynn Bartholomew, who served on Mr. Smith's jury, the prosecution wanted to ensure that she would not engage in any sort of nullification in answering the two special issues:

> Q. You take them independent. You can take them in either order. You can start with the second one first. They're just labeled one and two, but that doesn't mean you have to take them that way. You're supposed to take them independent of each other based on all the facts, let the facts

> determine what the answer is. By that, I mean don't answer them to get a desired result. Some people say, 'Well, if I find that he killed someone intentionally, I want him to die. So, I'm going to answer these yes to get that result regardless of the facts.' What we have to have are jurors that will tell us despite the fact that I found him guilty of capital murder and wanting a specific result, I will answer the questions based on the facts regardless of what the [sic] means, live or die. Do you think you can do that?
>
> A. Yes, I do.
>
> Q. Just let the facts and the circumstances dictate the way the answers to the questions should be answered regardless of the effect it has, either be a life or death sentence.
>
> A. I think I could.

SF 20:184-85.[2]

The jury verdict form did not include any mention of mitigating evidence, or of the ability of jurors to change their answers on the basis of such evidence, and asked only for answers to the two special issues:

[2]After this colloquy, defense counsel appeared to recognize the tension between the nullification instruction, which invited jurors to answer the special issues dishonestly in order to give effect to mitigating evidence, and the prosecution's anti-nullification comments, which told jurors not to answer the questions untruthfully to achieve a particular result. Accordingly, he sought to reassure Lynn Bartholomew that she could "change" one of her answers without truly "cheating or lying":

> Q. . . . Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence – that's really anything. It's stuff that you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances – if you felt that he shouldn't die, then you're authorized – actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from 'yes' to 'no' if you feel that he should not die. Do you have any problem with that?
> A. No.
> Q. Okay. I mean, it's not like you're cheating or lying or doing something –
> A. No.

SF 20:205.

SPECIAL VERDICT NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, LaRoyce Lathair Smith, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict, your will answer "Yes" or "No."

ANSWER:_____ [signature lines].

SPECIAL VERDICT NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, LaRoyce Lathair Smith, would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict, your will answer "Yes" or "No."

ANSWER:_____ [signature lines].

The jury verdict form is attached as Appendix 4. The jury answered both issues affirmatively, and Mr. Smith was sentenced to death.

HOW THE ISSUES WERE DECIDED BELOW

On direct appeal, Mr. Smith raised a claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989) *(Penry I)*, arguing that the Texas special issues on deliberateness and future dangerousness did not provide an adequate vehicle for giving effect to his mitigating evidence of low intelligence and turbulent family background. The Texas Court of Criminal Appeals rejected this claim in an unpublished opinion without

discussion, relying on a previous decision that found a similar nullification instruction to be sufficient. *Smith v. State*, No. 71,333, at 11 (Tex. Crim. App. June 22, 1994) (unpublished decision), *cert. denied*, 514 U.S. 1112 (1995) (citing *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992)).

In this state habeas proceedings, Mr. Smith again sought relief under *Penry I*, and the trial court recommended that the claim be denied. The trial court recommended that the claim not be entertained because it had been addressed on direct appeal; the trial court also concluded that Mr. Smith's mitigating evidence did not necessitate a supplemental instruction under the decisions of the Texas Court of Criminal Appeals.

Before the Texas Court of Criminal Appeals acted on the trial court's recommendation, this Court announced its opinion in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). In *Penry II*, this Court held, as in *Penry I*, that the special issues did not provide an adequate vehicle for the jury to give effect to the defendant's mitigating evidence. More particularly, this Court found in *Penry II* that the *Penry I* problem was not cured by additionally instructing jurors to answer the special issues dishonestly if they believed that mitigating evidence justified a sentence less than death. 532 U.S. at 796-804. In light of this Court's intervening decision in *Penry II*, the parties filed supplemental briefing on Mr. Smith's claim regarding the adequacy of the special issues and the supplemental nullification instruction to facilitate consideration of his mitigating evidence. The matter was argued to the Texas Court of Criminal Appeals on March 22, 2002, with the oral argument focused entirely on whether *Penry I* and *Penry II* required state habeas relief for Mr. Smith.

After oral argument in the Texas Court of Criminal Appeals but before that court issued its ruling in this case, this Court granted certiorari in two cases involving the adequacy of the Texas special issues to facilitate consideration of mitigating evidence. *Smith v. Dretke*, 124 S. Ct. 46 (2003),[3] and *Tennard v. Dretke*, 124 S. Ct. 383 (2003). Although both of these cases potentially bore on the appropriate resolution of Mr. Smith's claims,[4] the Texas Court of Criminal Appeals issued its opinion just before this Court issued its decision in *Tennard v. Dretke*. 542 U.S. ---, 124 S. Ct. 2059 (2004).[5]

The Texas Court of Criminal Appeals concluded that Mr. Smith's evidence of cognitive deficits and a turbulent childhood did not require a supplemental instruction under *Penry I*. The Texas Court of Criminal Appeals maintained that Mr. Smith had failed to establish the presence of a "severe and permanent disability," *Smith*, 132 S.W.3d at 414, and that he had "offered no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." *Id.* In this respect, the Texas

[3] Although the caption in the case is "*Smith v. Dretke*," the defendant's real name in that case is Robert McBride and is in no way connected to LaRoyce Lathair Smith.

[4] The question presented in *Smith v. Dretke* read:

> Did the Court of Appeals misapply *Penry v. Johnson*, 532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a 'uniquely severe permanent handicap' in order for a Texas capital murder defendant to claim that the use of a 'nullification' instruction was improper?

The first question presented in *Tennard v. Dretke* read:

> Is the Fifth Circuit's rule requiring a 'nexus' to the crime before evidence of impaired intellectual functioning and judgment can be considered as mitigation for purposes of determining whether there is a violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) inconsistent with the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002)?

[5] 542 U.S. ---, 124 S. Ct. 2059 (2004). *Smith v. Dretke* was dismissed as moot pursuant to Rule 46.1 (agreement of the parties) after the sentence of the petitioner (Robert McBride) was commuted to life imprisonment. 124 S. Ct. 1652 (2004).

Court of Criminal Appeals fully embraced the test that was emphatically rejected by this Court's recent intervening decision in *Tennard*.[6] According to the Texas Court of Criminal Appeals, without a "*prima facie* showing of a severe and permanent handicap, not of his own making, which is at least related to the commission of the capital offense," a defendant cannot pursue a claim challenging the failure of the special issues to provide a vehicle for the consideration of mitigating evidence.

In addition, the Texas Court of Criminal Appeals asserted without discussion that the mitigating qualities of Mr. Smith's cognitive limitations could be adequately addressed via the deliberateness special issue. *Smith*, 132 S.W.3d at 414-415. ("[a]pplicant's mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder"). The court also maintained that Mr. Smith's troubled background and low intelligence might not necessarily require an affirmative finding to the dangerousness special issue on the theory that Mr. Smith might be able to learn from his mistakes. *Id.* at 415.

The Texas Court of Criminal Appeals also purported to distinguish the nullification instruction given in Mr. Smith's case from the instruction rejected as inadequate by this Court in *Penry II*. According to the Texas Court of Criminal Appeals, the instruction in Smith's case unequivocally informed jurors of their power and duty to nullify. The court stated:

> These instructions expressly authorized and required the jury to answer 'No' to at least one of the special issues if it believed that the death penalty was not warranted because of the mitigating

[6] 524 U.S. at --- ("We hold that the Fifth Circuit's 'uniquely severe permanent handicap' and 'nexus' tests are incorrect, and we reject them.").

circumstances. The trial court's instructions clearly informed the jury that mitigation evidence 'trumped' the special issues.

Smith, 132 S.W.3d at 416 (footnote omitted).

Although the Texas Court of Criminal Appeals was unanimous in denying relief, four of the nine judges rejected the court's effort to distinguish *Penry II*. Judge Hervey agreed with the majority that Mr. Smith's evidence was not problematic under *Penry I*,[7] but insisted that "the 'nullification' instruction would, as a matter of federal constitutional law, suffer from the same defect as the one in *Penry II* had applicant presented any mitigating evidence that was beyond 'the effective reach of the sentencer.'" *Smith*, 132 S.W.3d at 425 (Hervey, J., joined by Keasler, J., concurring). Judge Holcomb concluded that Mr. Smith's evidence did require an additional instruction under *Penry I* because evidence of his troubled background reduced his moral culpability and yet "could only be aggravating" under the future dangerousness special issue. *Id.* at 431 (Holcomb, J., joined by Price, J., concurring). He also insisted that the nullification instruction was not meaningfully different from the instruction found constitutionally inadequate in *Penry II*. In particular, Judge Holcomb rejected the majority's contention that an explicit invitation to jurors to change their answers to the special issues was sufficient to meet the Court's concerns in *Penry II*:

> Unlike the majority, I do not find that the nullification instruction Smith received is significantly distinguishable from the one reviewed by the Supreme Court in *Penry II*. None of the differences between the instructions in *Penry II* and the instant case alter the fundamental aspects of the vehicle that was provided to the jury in an attempt to allow the jury to consider and give effect to the defendants' mitigating evidence. This vehicle, not merely the description of it, was at the heart of the Supreme Court's reasoning in determining that the instruction in *Penry II* was insufficient. The Supreme Court made this clear by assuming the jury could have understood that the instructions operated in the manner the State argued: by allowing the jury to change to a negative its answer to one of the special issues based on something other than what the question asked. Therefore, providing the same vehicle in more explicit terms does not overcome the defects identified in *Penry II*.

Smith, 132 S.W.3d at 423 (Holcomb, J., joined by Price, J., concurring). (footnotes omitted).[8]

[7] Judge Hervey also would have found Mr. Smith's claim unpreserved under state law. *Smith*, 132 S.W.3d at 423 (Hervey, J., concurring). The majority decision, however, applied no procedural bar and resolved the matter entirely on the merits of Mr. Smith's federal constitutional claim.

REASONS FOR GRANTING CERTIORARI

I. MR. SMITH'S EVIDENCE OF LIMITED MENTAL ABILITIES AND HIS TURBULENT BACKGROUND COULD NOT BE GIVEN ADEQUATE MITIGATING EFFECT VIA THE OLD TEXAS SPECIAL ISSUES AND THE TEXAS COURT OF CRIMINAL APPEALS' CONTRARY CONCLUSION IS WHOLLY UNDERCUT BY THIS COURT'S SUBSEQUENT DECISION IN *TENNARD V. DRETKE*, 542 U.S. —, 124 S. CT. 2059 (2004).

The mitigating evidence in this case is remarkably similar to the evidence in both the *Penry* litigation and *Tennard v. Dretke*. As in *Penry* and *Tennard*, Mr. Smith offered substantial evidence of cognitive impairment and documented his impairment via extensive records and testimony. Like Penry, Mr. Smith also introduced evidence of a difficult and abusive family situation and background. Mr. Smith's evidence tended to reduce his moral culpability, yet the former special issues in the Texas scheme offered no vehicle for jurors to consider and give effect to such evidence. In fact, the very facts that reduced Mr. Smith's moral culpability – his limited intelligence and turbulent background – supported rather than undermined

[8] Judge Holcomb, like Judge Hervey, would have rejected Mr. Smith's claim on procedural grounds, see supra note 8, notwithstanding the majority's unwillingness to impose any procedural barrier to Mr. Smith's claim.

affirmative answers to the deliberateness and dangerousness questions. In this respect, Mr. Smith's evidence was "double-edged" and actually undercut the jurors' ability to truthfully answer the special issues so as to produce a sentence less than death.

The Texas Court of Criminal Appeals, invoking the test developed in the Fifth Circuit Court of Appeals,[9] dismissed Mr. Smith's mitigating evidence because it did not amount to a "severe and permanent handicap," *Smith*, 132 S.W.3d at 415, and Mr. Smith failed to establish an appropriate "evidentiary link" between his evidence and his crime. *Id.* at 414. In *Tennard*, this Court rejected precisely this reasoning, declaring that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court." 542 U.S. at --- (slip op. at 9). Mitigating evidence need not reach a severity threshold to require a vehicle for jurors' consideration. As this Court said in *Tennard*, "the question is simply whether the evidence is of such a character that might serve as a basis for a sentence less than death." 542 U.S. at --- (slip op. at 12) (internal citation marks and citation omitted). Moreover, a defendant need not establish any sort of evidentiary link between his low intelligence and the crime in order for jurors to be able to give effect to its mitigating qualities. Again, in *Tennard*, this Court explicitly rejected this sort of reasoning, stating that it would not "countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime." 542 U.S. at --- (slip op. at 13).

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[9] *Smith*, 132 S.W.3d at 413 ("For more than ten years, the Fifth Circuit has drawn the line between *Penry* and non-*Penry* mitigation evidence under the test of whether the defendant's criminal act was 'due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own.'") (quoting *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003)).

In addition, the Texas Court of Criminal Appeals' bare assertion that Mr. Smith's low intelligence could be given adequate effect through the deliberateness special issue cannot be squared with *Tennard*. Speaking of Tennard's evidence of low intelligence, this Court declared that "[t]he relationship between the special issues and Tennard's low IQ evidence has the same essential features as the relationship between the special issues and Penry's mental retardation evidence. Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately." 542 U.S. at — (slip op. at 14).

At the same time, the Texas Court of Criminal Appeals offered no plausible way in which Mr. Smith's mitigating evidence would render him less dangerous so as to support a negative answer to the second special issue. Instead, the court emphasized that Penry's disabilities were more severe than Mr. Smith's and that Mr. Smith might be able to control his impulses in the future. *Smith*, 132 S.W.3d at 415. At most, though, this sort of reasoning suggests that Mr. Smith's evidence might not *require* an affirmative answer to the second special issue; it in no way suggests that the second special issue would provide an appropriate vehicle for responding to the mitigating qualities of Mr. Smith's evidence – that the jury could regard such evidence as a basis for concluding that Mr. Smith would *not* be a danger. Indeed, the Texas Criminal Court of Appeals concluded that Mr. Smith's mitigating evidence might simply be irrelevant to the second special issue: "There is no evidence that applicant was unable to learn from experience or unable to control his conduct, with or without his disabilities." *Id.* Accordingly, the second special issue did not provide a vehicle for jurors to give effect to Mr. Smith's mitigating evidence, even if it is possible that jurors

might have concluded, *for reasons unrelated to his disabilities*, that Mr. Smith would not be a danger in the future.

Overall, the Texas Court of Criminal Appeals' conclusion that Mr. Smith's evidence was not problematic under *Penry I* cannot withstand this Court's intervening decision in *Tennard*.

II THE NULLIFICATION INSTRUCTION IN MR. SMITH'S CASE WAS INDISTINGUISHABLE FROM THE INSTRUCTION CONDEMNED IN *PENRY V. JOHNSON*, 532 U.S. 782 (2001) (*PENRY II*) AND THE FAILURE OF THE TEXAS COURT OF CRIMINAL APPEALS TO CREDIT THIS COURT'S ARGUMENTS IN *PENRY II* REQUIRES THIS COURT'S INTERVENTION.

Mr. Smith trial occurred during the interval between this Court's decision in *Penry I* and the modification of the Texas statute to allow for consideration of mitigating evidence unrelated to the special issues.[10] In addition to the two special issues on deliberateness and dangerousness, the trial court also instructed the jurors that they should answer at least one of the special issues "No" if they believed that the death penalty should not be imposed due to the mitigating evidence presented even if the evidence had "no relationship to any of the Special Issues."[11] Thus, the jurors were compelled to act dishonestly in order to give effect to mitigating evidence. If they believed that the "true" answers to deliberateness and dangerousness were "Yes" but also believed that the defendant should not receive the death penalty because of mitigating evidence with "no relationship to any of the Special Issues," they were required to give a false answer "No" to one of the questions. In addition, as in *Penry II*, the verdict form given to the jurors made no mention of mitigating evidence or the nullification instruction, but simply asked the jurors to answer the special issue questions on deliberateness and dangerousness.[12]

This Court unequivocally declared in *Penry II* that instructing jurors to answer one of the special issues falsely to give effect to mitigating evidence "inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions. 532 U.S. 782, 800 (quoting *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976)).

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[10] The new statute includes a "catch-all" special issue, asking "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence by imposed." TEX. CODE CRIM. PROC. ANN., ART. 37.071(2)(e)(1)(Vernon 2003).

[11] The full instruction, attached as Appendix 3, was as follows:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

[12] The jury verdict form is attached as Appendix 4.

A bare majority of the Texas Court of Criminal Appeals nonetheless purported to distinguish the instruction given in this case from the instruction given in *Penry II*.[13] According to the Texas Court of Criminal Appeals, the saving grace of the instruction in this case was that it more clearly informed jurors of their power to nullify than did the instruction in *Penry II*. According to the court " the trial court's instructions clearly informed the jury that the mitigation evidence 'trumped' the special issues." *Smith*, 132 S.W.3d at 416. In *Penry II*, though, the State made the same argument about the nullification instruction – that it clearly conveyed the jury's power to nullify their answers to the special issues to give effect to mitigating evidence.[14] This Court assumed for the sake of argument that the nullification instruction was clear in this regard, but still rejected the instruction because it put jurors in the "logically and ethically impossible" position of choosing whether to answer the special issues honestly or follow the nullification instruction. 532 U.S. at 799.

[13] The nullification instruction in *Penry II* was as follows:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal moral culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues. See. 532 U.S. at 789-90.

[14] See 532 U.S. at 798 ("Alternatively, the State urges, it is possible to understand the supplemental instruction as informing the jury that it could 'simply answer one of the special issues "no" if it believed that mitigating circumstances made a life sentence . . . appropriate . . . regardless of its initial answers to the questions.'") (quoting Brief for Respondent).

At the core of this Court's opinion in *Penry II* was the principle that jurors should not have to answer questions dishonestly to give effect to mitigating evidence. The Texas Court of Criminal Appeals' opinion unpersuasively suggests that jurors were not confronted with this dilemma in Mr. Smith's case because the jurors were very clearly instructed to lie: "[t]he instruction did not instruct the jury to violate their oaths or answer either of the special issues 'falsely,' but rather to answer the special issues honestly in light of both the question itself *and* the defendant's mitigating evidence which, as the trial court clearly informed the jury, might or might not have direct relevance to those specific issues." *Smith*, 132 S.W.3d at 416, n33.[15] It is hard to fathom what the court means by answering the issues "honestly" in light of evidence that has no relevance to the issues. If the jurors believed that the state had established deliberateness and dangerousness beyond a reasonable doubt, the only means for the jury to give effect to Mr. Smith's mitigating evidence was to falsely answer that the state had not done so.

Moreover, the logical and ethical dilemma wrought by the nullification instruction was intensified in this case by the prosecution's effort to counter its effects. During voir dire, the prosecution secured the jurors promise to "let the facts determine" the answers to the special issues and not to "answer them to get a desired result." See, e.g., SF 20:184-85 (voir dire of Lynn Bartholomew). The prosecution again reminded jurors of this promise during closing argument, insisting that if the prosecution proved "that the

[15] It is telling that the Texas Court of Criminal Appeals finds support for this sort of argument not in the majority opinion of *Penry II* but in the dissent. *See Smith*, 132 S.W.3d at 416, n.33 (citing 532 U.S. at 806-07 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (invoking dissenting opinion in *Penry II* as support for proposition that clear nullification commands would satisfy the Constitution).

answers to those special issues should be yes" that the jurors must answer them accordingly. SF 33:20. If a nullification instruction by itself injects arbitrariness and capriciousness in a capital trial, a nullification instruction accompanied by an "anti-nullification" command surely cannot satisfy constitutional requirements.

Overall, the grounds on which the Texas Court of Criminal Appeals denied relief in this case were explicitly considered and rejected in *Penry II* and the court's contrary conclusion implicitly challenges this Court's authoritative constitutional interpretive role.[16] If this Court believes that there is a plausible ground for parsing different nullification instructions in the Texas capital context, this Court should grant certiorari to resolve the confusion evident in the closely divided opinion in the Texas Court of Criminal Appeals. If, on the other hand, this Court regards the Texas Court of Criminal Appeals decision as irreconcilable with the letter and spirit of *Penry II*, this Court should summarily reverse the decision below to give full effect to its constitutional judgment.

[16] One of the concurring opinions in the Texas Court of Criminal Appeals appeared to remark precisely on this question of the Texas court's obligation to acquiesce in this Court's decisions: "[f]inally having decided that no federal constitutional violation occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding, and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case." *But see Penry II*, 121 S. Ct. at 1922-23." *Smith*, 132 S.W.3d at 427 (Hervey, J., joined by Keasler, J., concurring).

CONCLUSION

For these reasons, this Court should grant certiorari to ensure compliance with its decisions in *Penry I* and *Penry II*. Because of the unusual posture of this case and this Court's recent extensive efforts to clarify the Eighth Amendment rights at stake in the Texas capital sentencing context, this Court should issue a summary decision reversing the decision of the Texas Court of Criminal Appeals. In the alternative, this Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the lower court's decision denying Smith's Eighth Amendment claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989), should be reversed in light of *Tennard v. Dretke*, 124 S. Ct. 2562 (2004).

II. Whether the supplemental mitigation instruction submitted during Smith's punishment trial violated the Eighth Amendment rationale of *Penry v. Johnson*, 532 U.S. 782 (2001).

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Sup. Ct. R. 10 7

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner LaRoyce Lathair Smith ("Smith")[1] was properly convicted and sentenced to death for the brutal murder of Jennifer Soto. In the instant petition for certiorari review of the lower court's denial of habeas corpus relief, Smith argues that his Eighth Amendment rights — as defined by *Penry I*,[2] *Penry II*,[3] and *Tennard v. Dretke*[4] — were violated by the jury instructions and special issues submitted during the punishment phase of his 1991 trial. Petition at 13-20. However, Smith's claims are without merit and certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals of Texas set forth the evidence supporting Smith's capital murder conviction in its opinion on direct appeal:

> Around 11:30 p.m. on January 7, 1991, [Jennifer Soto] was working as the shift manager at a Taco Bell in Dallas County. She was responsible for closing and cleaning the store and completing the appropriate paperwork. A co-employee, Travis Brown, was waiting inside the restaurant for [Soto] to finish her duties so that she could give him a ride home. Brown testified that [Smith] arrived at the restaurant by automobile with several other youths. [Smith] and two others then got out of the car and knocked on the door, claiming to need to use the telephone. Brown would not let the three enter the establishment because it was closed. He did, however, go to the back of the store and get [Soto]. [Soto] recognized [Smith] as an ex-employee and allowed him to enter. [Smith] then let his two colleagues into the restaurant. Brown testified at trial that [Soto] then returned to the back of the store to finish some paperwork while [Smith] used the phone. After he hung up the phone, [Smith] came to the front of the restaurant and told Brown to leave because they were going to rob the Taco Bell. However, Brown professed that he could not leave. [Smith] then went to the back office where [Soto] was working. Shortly after that, Brown heard some "yelling" and went to check it out. He found [Smith] "pistol-whipping" [Soto] while he had her in a headlock. After Brown attempted to get [Smith] to stop the attack, [Smith] stepped back and fired a shot at [Soto].[5] [Smith] then walked into the kitchen, grabbed a butcher knife, and returned to the office where he stabbed [Soto] three or four times. After this, all three perpetrators left the restaurant. Just before exiting, [Smith] told Brown that he would kill him if he talked to the police. However, after [Smith] left, Brown called the police.

Smith v. State, No. 71,333, at 1-2 (Tex. Crim. App. 1994) (unpublished opinion) (emphasis in original).[6] Smith was convicted of capital murder on June 14, 1991 for murdering Soto during the course of committing or attempting to commit robbery. CR 3, 108, 121-22.[7]

II. Facts Relating to Punishment

The state court also summarized the evidence which supported the jury's finding of future dangerousness:

> Looking at the evidence in the light most favorable to the verdict, we find the circumstances of the offense to be rather cruel. [Smith] knew [Soto] and even hugged her when he came into the restaurant to use the phone. However, either in an attempt to get her to cooperate in opening the restaurant's safe or because of her inability to do so, he held her around the neck and hit her with the gun until part of it broke. [Smith] then shot her in the back. Apparently still not feeling finished with his handiwork, [Smith] went into the kitchen to

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1 Respondent State of Texas will be referred to as "the State.

2 *Penry v. Lynaugh*, 402 U.S. 302 (1989).

3 *Penry v. Johnson*, 532 U.S. 782 (2001).

4 124 S. Ct. 2562 (2004).

5 Brown clarified that he didn't think that [Smith] *shot* [Soto], just that he shot *at* her. However, the medical examiner's testimony revealed that [Soto] was shot once in the back.

6 The state court's direct appeal opinion is attached to Smith's Petition as Appendix 2.

7 "CR" refers to the Clerk's Record of pleadings and documents filed with the court during trial, followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page numbers.

get a butcher knife. On his return, he proceeded to stab [Soto] several times in the neck, chest, and thigh, including several wounds which were characterized by the State as "torture type wounds."

The manner in which the offense was committed illustrated some degree of forethought and deliberation on [Smith]'s part. Furthermore, he appeared to be both the planner and the initiator of the crime. Some time before the actual incident, [Smith] evidently had formulated a plan to rob this Taco Bell because he "needed some money for court." Two of his companions heard him talking about the intended robbery over the phone, and [Smith] was later heard to ask the driver of the car if "he was going to do that for me" (apparently referring to the robbery considering all of the statements in context). After the driver replied "I guess so," the group proceeded to a house where [Smith] retrieved another person and was seen to have a gun in his hand. The group then proceeded to the Taco Bell. When they first arrived at the restaurant, [Smith] and two others got out of the car, but did not enter the restaurant. They got back into the car and began to drive away, but [Smith] encouraged the driver to turn around and go back.

[Smith] was nineteen years old at the time of this offense, and he was shown to have one prior conviction for misdemeanor assault.[8] [Smith] had also been stopped for the offense of "pedestrian in roadway," whereupon it was discovered that he had outstanding traffic warrants. During a search incident to [Smith]'s arrest on these outstanding warrants, police discovered a baggie in [Smith]'s underwear containing ten rocks of crack cocaine.[9]

Appendix 2 at 3-4.

The lower court also described the mitigating evidence presented on Smith's behalf during punishment:[10]

> First, [Smith] offered evidence of his limited mental capacity. [Smith]'s mother testified that [Smith] was "a slow learner" in school. He had an IQ of 78 and possible organic learning disabilities. [Smith] attended special-education classes and his behavior was often noted as "exemplary," but he dropped out of school in the ninth grade at the age of eighteen. He committed this capital murder at the age of nineteen.
>
> * * *
>
> Second, [Smith] offered evidence of his difficult family background. His father had been in prison for robbery, was involved with a motorcycle gang, consorted with other women, used alcohol and drugs, and stole from his own family. This situation upset [Smith]. Because the family did not have a lot of money, [Smith] began looking for work as a young teenager. According to defense witnesses, [Smith] suffered because of his father's thefts from the family and from a lack of money in the home.

Ex parte Smith, 132 S.W.3d 407, 413 (Tex. Crim. App. 2004).[11]

Smith was then sentenced to death based on the jury's answers to the special issues. CR 120-23.[12] As the lower court explained:

> Under the law in effect at the time of the trial, the jury was then given two special issues during the punishment phase: First, was the killing deliberate? And second, does the defendant pose a continuing danger to others? Because this trial took place during that two-year hiatus between the Supreme Court's decision in *Penry I* and the Texas Legislature's enactment of a new statutory special issue in response to *Penry I,* the trial judge also gave the jury a non-statutory nullification instruction. That supplemental instruction read:

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[8] The evidence indicated that this conviction began as a felony aggravated assault. The facts show that [Smith] began seeing a girl whose boyfriend, Christopher Standmier, went off to college after agreeing to have an open relationship. However, when the girl started seeing [Smith], Standmier wrote her cruel letters and broke off the relationship. One day when Standmier was back in town, [Smith] saw him and began harassing him and a fight ensued. [Smith] pulled a baseball bat from his car and struck Standmier in the ribs and broke the bat over his head. Then [Smith] ran back to his vehicle and pulled out a gun. Standmier backed down and [Smith] left.

[Smith] was originally charged with aggravated assault, but the charges were reduced to a misdemeanor when Standmier got tired of taking off from school to come to court.

[9] The actual weight of the cocaine measured only one-fifteenth gram.

[10] "While no psychiatric evidence was admitted, character evidence was presented by several high school teachers and other officials, family members, the family's reverend, and various others ...." Appendix 2 at 5.

[11] The lower court's opinion denying habeas relief is attached to Smith's Petition as Appendix 1.

[12] The punishment charge and verdict form submitted to the jury are attached to Smith's Petition as Appendix 3.

You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.

These supplemental instructions explicitly told the jury that:

1. It "shall" consider any and all mitigating evidence;
2. The mitigating evidence might, but need not, relate to the defendant's character, record, background, or any circumstances of the offense;
3. Mitigating evidence is any evidence which reduces the defendant's personal or moral culpability or blameworthiness;
4. Mitigating evidence need not have any relationship to either of the Special Issues;
5. The jurors need not be unanimous about what specific evidence each one considers mitigating;
6. The jurors each decide what evidence is mitigating and how much weight to give it;
7. If the jury finds, from the mitigating evidence, that the defendant should not be sentenced to death, then it "shall" answer one of the Special Issues "No"; and
8. The State must prove, beyond a reasonable doubt, that the death penalty should be imposed despite the mitigating evidence.

Appendix 1 at 3-4 (footnotes omitted).

III. Direct Appeal and Postconviction Proceedings

Smith's conviction and sentence were affirmed by the lower court on June 22, 1994. Appendix 2. This Court denied certiorari review. *Smith v. Texas,* 514 U.S. 1112 (1995). Smith then sought state collateral review but his application was dismissed as untimely filed on July 15, 1998. *Ex parte Smith,* 977 S.W.2d 610 (Tex. Crim. App. 1998). This Court again declined to issue a writ of certiorari. *Smith v. Texas,* 525 U.S. 1148 (1999). Smith next filed a petition for postconviction relief in the United States District Court for the Northern District of Texas, but this proceeding was ultimately dismissed without prejudice so that Smith could return to state court pursuant to newly enacted procedures for untimely applications. *Smith v. Johnson,* No. 3:98-CV-1778 (N.D. Tex. 1999); TEX. CODE CRIM. PROC. art. 11.071, § 4A (West 1999). Smith's second state habeas application was denied

on its merits on April 21, 2004. Appendix 1. The instant petition for certiorari review followed.[13]

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2004). Smith advances no compelling reason in this case, and none exists. Further, because there is no constitutional right to state habeas corpus proceedings, it follows that the denial of state habeas relief does not present a federal question for certiorari review. As Justice O'Connor has described the role of state habeas corpus proceedings:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings ... nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring).

Similarly, Justice Stevens has noted that:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). Smith's claims are now due to be raised in federal habeas proceedings, which are currently pending. Thus, it appears that "the more appropriate avenue" is now available for the litigation of the instant claims.

[13] On July 23, 2004, Smith obtained appointed counsel in order to pursue habeas corpus relief once again in the federal district court. *Smith v. Dretke,* No. 3:04-CV-01576 (N.D. Tex.). No petition has yet been filed, although the State has agreed to waive limitations provided that Smith files his petition within ninety days of the disposition of the instant certiorari petition.

II. The Lower Court Correctly Held That Smith's Jury Was Not Altogether Prevented from Considering His Mitigating Evidence of Limited Mental Capacity and Difficult Family Background in Answering the Punishment Phase Special Issues.

Smith contends that his jury was deprived of a vehicle with which to give mitigating effect to his evidence of limited intelligence and troubled upbringing in violation of *Penry I.* Petition at 13-14, 15-16. Smith also alleges that the lower court erred in invoking the Fifth Circuit's "constitutional relevance" standard, which was rejected by this Court in *Tennard,* in denying habeas relief. *Id.* at 14-15. However, the court below properly determined that "the two special issues given in this case provided a sufficient vehicle for the jury to give effect to [Smith]'s mitigating evidence of a troubled childhood and of his somewhat limited mental ability." Appendix 1 at 6. This is because "[Smith]'s mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder and both his learning disability and troubled background were relevant to whether he would constitute a future danger to society." *Id.* at 7-9. As a result, certiorari should be denied.

A. The special issues were constitutionally adequate vehicles for the consideration of Smith's mitigating evidence.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital sentencing authority be allowed to consider mitigating circumstances), *Jurek v. Texas,* 428 U.S. 262, 276 (1976) (explaining that the pre-1991 Texas special issues — deliberateness and future dangerousness — allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain

damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise that this Court has repeatedly refused to extend to other types of mitigating evidence.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital sentencing jury not be precluded from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson,* 428 U.S. at 303-04. As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin v. Lynaugh,* 487 U.S. 164, 174 (1988) (plurality opinion); *Skipper v. South Carolina,* 476 U.S. 1, 7 n. 2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of

particularized mitigating factors," *e.g.,* a defendant's criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse.[14] 428 U.S. at 272-73. This conclusion was reaffirmed in *Lowenfield v. Phelps,* 484 U.S. 231, 245 (1988), and in *Franklin,* 487 U.S. at 182. Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did not allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse.[15] 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able ... to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future dangerousness special issue only as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to Penry's "two-edged" evidence. *Id.* at 324.

During its next term, however, the Court held that a mere possibility that the jury was precluded from considering relevant mitigating evidence did not establish Eighth Amendment error. *Boyde v. California,* 494 U.S. 370, 380 (1990). Rather, such error occurred only if there was a "reasonable likelihood" that the jury applied its instructions in

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[14] Smith fails to cite *Jurek* whatsoever or acknowledge that it remains controlling authority. *See Graham v. Collins,* 506 U.S. 461, 474-77 (1993) (explaining that *Penry I* is the exception to *Jurek*).

[15] Penry's evidence suggested that he was mildly or moderately retarded, may have suffered traumatic damage to his brain at birth or as a result of later injuries, and was frequently beaten about the head and locked in his room as a child. *Penry I,* 492 U.S. at 307-09. The Court specifically noted that its *Penry I* opinion did not negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence could be considered under the plain language of the special issues. *Id.* at 315-19.

a way that prevented the consideration of such evidence. *Id.* The Court further limited its holding in *Saffle v. Parks*, 494 U.S. 484 (1990), applying *Teague*[16] to preclude relief where there was no indication that the jury was "altogether prevented" from giving some effect to the evidence. *Id.* at 490-92. Indeed, the Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not solely aggravating when viewed through the lens of the special issues.

For example, in *Graham*, the Court imposed a *Teague* bar and declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the ... Texas death penalty statute." 506 U.S. at 474. Instead, the Court distinguished the thrust of Graham's mitigating evidence — "that his brief spasm of criminal activity ... was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated" — from Penry's. *Id.* at 475. The "mitigating significance" of Graham's evidence did not compel affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76. Thus, as in *Boyde*, the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original).

The same term, the Court reconsidered a *Graham*-type challenge to the special issues on direct appeal, where it was not bound by *Teague*. *Johnson v. Texas*, 509 U.S. 350, 352 (1993). In *Johnson*, the Court again concluded that "[i]t strains credulity to suppose that the

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[16] *Teague v. Lane*, 489 U.S. 288 (1989). The Court had previously found that *Teague* did not bar the relief sought in *Penry I*, because Penry merely requested vindication of his Eighth Amendment rights under *Eddings* as required by the evidence presented "*in his particular case*." *Penry I*, 492 U.S. at 318-19 (emphasis in original). This holding unequivocally did "not 'impos[e] a new obligation' on the State of Texas." *Id.* at 319 (quoting *Teague*, 489 U.S. at 301).

jury would have viewed the evidence of [Johnson]'s youth as outside its effective reach in answering the [future dangerousness] special issue." *Id.* at 368. This is the case even if the mitigating evidence could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. As in *Graham* and *Johnson*, there was no reasonable likelihood that Smith's jury was prevented from giving effect to his mitigating evidence when answering the special issues.

As summarized *supra*, Smith's mitigating evidence consisted entirely of lay testimony regarding his troubled childhood and limited mental ability. This evidence was within the effective reach of the jury. Unlike in *Penry I*, Smith did not present evidence of any mental impairment or childhood trauma that would tend to diminish his impulse control or ability to evaluate the consequences of his mistakes. Contrary to Smith's conclusory argument, the evidence was not solely aggravating and did not "undercut the jury's ability to truthfully answer the special issues so as to produce a sentence less than death." Petition at 13-14. Instead, Smith's "evidence shows the reverse: despite [his] limitations and difficulties, his behavior in school was often 'exemplary.'"[17] Appendix 1 at 8. Thus, the jury could have given effect to Smith's mitigating evidence by answering the future dangerousness special issue negatively. Indeed, this Court has repeatedly held that similar evidence was within the scope of the special issues. *See, e.g., Johnson*, 509 U.S. at 356; *Graham*, 506 U.S. at 463; *Franklin*, 487 U.S. at 168; *Jurek*, 428 U.S. at 266-67. As a result, certiorari should be denied.

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[17] Smith argued during punishment that he was a candidate for rehabilitation and that he would prosper in "a controlled environment" such as prison. 33 RR 45-46, 53-54, 66-69. Smith also pointed out the fact that he had no disciplinary incidents during the six months he was incarcerated awaiting trial. *Id.* at 53-55.

B. This Court's opinion in *Tennard* did not impugn the lower court's application of *Penry I*.

In *Tennard,* the petitioner presented evidence during the punishment phase of trial that he had an IQ score of 67 and that his low IQ and gullible nature mitigated his culpability. 124 S. Ct. at 2566. During federal habeas proceedings, Tennard argued that *Penry I* error occurred because the jury was unable to give effect to this evidence in answering the deliberateness and future dangerousness special issues. *Tennard v. Cockrell,* 284 F.3d 591, 595 (5th Cir. 2002), *reinstated,* 317 F.3d 476 (5th Cir. 2003), *rev'd,* 124 S. Ct. 2562 (2004). In adjudicating the claim, the Fifth Circuit cited its well known two-part test, which sought to determine (1) whether the mitigating evidence introduced at trial was "constitutionally relevant,"[18] and (2) whether the evidence was beyond the effective reach of the jury in answering the special issues. *Id.* (citing *Davis v. Scott,* 51 F.3d 457, 460 (5th Cir. 1995), *abrogated by Tennard,* 124 S. Ct. at 2569-72). The court of appeals then rejected Tennard's *Penry I* claim because his IQ score evidence did not satisfy the threshold constitutional relevance standard, *i.e.,* it was not evidence of a severe handicap that was causally connected to the crime. *Id.* at 596-97 (citing *Boyd v. Johnson,* 167 F.3d 907, 912 (5th Cir. 1999), *Lackey v. Scott,* 28 F.3d 486, 489-90 (5th Cir.1994), and *Andrews v. Collins,* 21 F.3d 612, 629-30 (5th Cir.1994)). The Fifth Circuit did not reach the second stage of the *Davis* analysis.

This Court reversed, holding that the Fifth Circuit's constitutional relevance test was an "improper legal standard" with "no basis in [Supreme Court] precedents," and the correct

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[18] The court of appeals explained that, "[t]o be constitutionally relevant, the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, ... and (2) that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell,* 284 F.3d at 595 (internal quotations omitted).

standard to be applied was *only* whether the evidence was within the effective reach of the jury in answering the special issues. *Tennard,* 124 S. Ct. at 2569-72. Because the Fifth Circuit had not considered this question, and reasonable jurists might disagree as to the outcome, the Court granted a certificate of appealability and remanded for further review. *Id.* at 2572-73. The Court also determined that "reasonable jurist[s] could conclude that the jury might well have given Tennard's low IQ evidence aggravating effect in considering his future dangerousness, not only as a matter of probable inference from the evidence *but also because the prosecutor told them to do so.*" *Id.* at 2572 (emphasis added). However, the Court did *not* hold that Tennard's jury necessarily gave the evidence *only* aggravating effect and, thus, did not actually find *Penry I* error.

In resolving Smith's claim, the lower court adopted and applied the Fifth Circuit's constitutional relevance analysis.[19] Appendix 1 at 6-7. However, the court also addressed the proper issue identified in *Tennard*: whether Smith's mitigating evidence was within the effective reach of the jury in answering the special issues. *Id.* at 6-9. The court below recognized *Penry I* as the controlling precedent and compared Smith's mitigating evidence to Penry's.[20] *Id.* at 5-6. The court then specifically addressed how this evidence was relevant to the special issues in a mitigating way. *Id.* at 7-8. The court below did not "screen out any positive aspect" of Smith's mitigating evidence before conducting its *Penry I* analysis, as the Fifth Circuit erroneously did in *Tennard.* 124 S. Ct. at 2570-71. Thus, the court did not

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[19] It should be noted that the Court of Criminal Appeals adopted a four-part restatement of the constitutional relevance analysis. Appendix 1 at 7 (citing *Robertson v. Cockrell,* 325 F.3d 243 (5th Cir.) (*en banc*), *cert. denied,* 124 S. Ct. 28 (2003)). This revised standard — addressing voluntariness, permanence, severity, and attribution — was first articulated by the *en banc* Fifth Circuit in 2003 and was not at issue in *Tennard.*

[20] The court also noted that the evidence supporting Smith's *Penry I* claim was more like the evidence in *Robertson* than the evidence in *Tennard. Smith,* 132 S.W.3d at 413 n.19.

resolve Smith's claim under an improper legal standard because it applied the proper standard in the alternative. Nevertheless, the holding of *Tennard, i.e.*, reasonable jurists would debate the application of *Penry I* to the facts of Tennard's case, is immaterial here, where the debatability of the lower court's conclusion is not at issue. 124 S. Ct. at 2573 (citing *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)). Finally, *Tennard* is distinguishable because the prosecutor in the instant case did *not* argue that Smith's troubled family history or intellectual limitations were irrelevant or would make him more dangerous. *Cf. id.* at 2572-73; 33 RR 17-33, 70-84. Consequently, *Tennard* is inapposite to the instant case, and certiorari should be denied.

III. The Court below Properly Held That the Mere Submission of a Supplemental Instruction Concerning Mitigating Evidence Does Not Amount to *per se* Eighth Amendment Error Regardless of the Quality or Quantity of the Mitigating Evidence Presented at Trial.

In *Penry II,* this Court granted certiorari in order to decide whether the supplemental instruction given during Penry's retrial — an instruction similar to the one at issue here — "complied with [the Court's] mandate in *Penry I.*" *Penry II,* 532 U.S. at 786. The Court first reiterated its holding in *Penry I* — that the mitigating evidence presented at Penry's 1980 trial was "relevant only as an *aggravating* factor" to the special issues — and explained that Penry was retried in 1990, where "the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse." *Id.* at 787-88. The Court then considered whether the Texas court had "unreasonably applied" *Penry I* by its endorsement of the supplemental instruction. *Id.* at 796-804.

The Court recognized "two possible ways" to interpret the supplemental instruction:

> First, ... it can be understood as telling the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue. Viewed in this light, however, the supplemental instruction placed the

> jury in no better position than was the jury in *Penry I.* As we made clear in *Penry I,* none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to *the evidence of Penry's mental retardation and childhood abuse.* In the words of Judge Dennis below, the jury's ability to consider and give effect to Penry's mitigating evidence was *still "shackled and confined within the scope of the three special issues.* Thus, because the supplemental instruction had *no practical effect,* the jury instructions at Penry's second sentencing were *not meaningfully different* from the ones we found constitutionally inadequate in *Penry I.*
>
> Alternatively, ... it is possible to understand the supplemental instruction as informing the jury that it could "simply answer one of the special issues 'no' if it believed that mitigating circumstances made a life sentence ... appropriate ... regardless of its initial answers to the questions."

Penry II, 532 U.S. at 798 (emphasis added, internal citations omitted).

While the first interpretation effected no change, the second rendered the jury charge "internally contradictory" because the jury was also instructed that a "yes" answer to a special issue was appropriate only where supported by evidence proved beyond a reasonable doubt and a "no" answer was called for only when there was a reasonable doubt. *Penry II,* 532 U.S. at 799. The supplemental instruction directed the jury to "change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." *Id.* The Court reasoned:

> Here, ... it would have been both logically and ethically impossible for a juror to follow [the] instructions. *Because Penry's mitigating evidence did not fit within the scope of the special issues,* answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "true verdict."

Id. at 799-800 (emphasis added, internal citations omitted). This mechanism created "a

reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of Penry's mental retardation and childhood abuse." *Id.* at 800 (internal quotations omitted).

Thus, neither of the two possible views of the supplemental instruction cured the error recognized in *Penry I*. The first left the jury in same position as before, with no way to give effect to mitigating evidence that was only relevant to the special issues in an *aggravating* way. Conversely, the second advised the jury to render a false verdict because Penry's evidence was not relevant to the special issues in any *mitigating* way. However, both arguments rest on the same foundation: that Penry's evidence of mental retardation, brain damage, and severe child abuse was beyond the scope of the special issues. In essence, the supplemental instruction did not *create* new error; rather, the instruction simply *failed to correct* the error identified in *Penry I* because, during Penry's retrial, the jury was again faced with mitigating evidence that compelled affirmative answers to the special issues and created a likelihood that the jury was unable to ethically assess a life sentence if it so chose.

It follows that evidence with *some* mitigating relevance to the special issues, even if it were also aggravating, would not result in *Penry II* error because the jury's "no" answers would not be false. Rather, the jury would remain "shackled and confined" within the scope of the special issues, and its negative answers would reflect a legitimate, reasonable doubt regarding the State's evidence, as before. *See Robertson,* 325 F.3d at 258 (where the "culpability-mitigating evidence is encompassed by the Texas special issues, there is no need to provide an additional vehicle for it"), *abrogated on other grounds by Tennard,* 124 S. Ct. at 2569-72. As in *Robertson,* "[t]he jury was not forced into the position — as they were in *Penry II* — of falsely answering "no" to the questions of deliberateness or future dangerousness. The most that one could say is that the supplemental instruction was

redundant."[21] *Id.* Thus, there can be no *per se* error as a result of the supplemental instruction.[22] Moreover, *Penry II* continued the case-specific analysis mandated in the Court's opinions discussed *supra.* Indeed, there is no way of determining the likelihood of *Penry I* error without examining the nature of the mitigating evidence presented. As the Court explained in *Boyde,* "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." 494 U.S. at 380-81. In Smith's case, because the mitigating evidence presented was not beyond the scope of the special issues, and there was no reasonable likelihood that the jury was precluded from truthfully answering the special issues in order to give it effect, neither interpretation of the supplemental instruction could result in constitutional error.

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[21] In any event, the supplemental instruction submitted in this case was dissimilar to the one submitted in *Penry II* because the jury was explicitly told that it was *obligated* to consider any mitigating evidence that might reduce Smith's personal or moral culpability or blameworthiness even if it was unrelated to the special issues. Appendix 1 at 9-10. Further, the instruction *required* the jury to equate diminished culpability with reasonable doubt and, thus, to truthfully answer the special issues negatively in order to reflect such a reasonable doubt. *Id.* at 9-10 & n.33. As a result, the supplemental instruction "provided 'a more capacious vehicle than was constitutionally warranted'" because "it explicitly put a burden on the State to prove, beyond a reasonable doubt, that the death penalty should be imposed despite any mitigating evidence." *Id.* (quoting *Robertson,* 325 F.3d at 258).

[22] In fact, given the Court's reluctance to extend *Penry I* beyond its facts in light of *Teague,* the conclusion that the supplemental instruction created *per se* error would be *Teague*-barred. *See Robertson,* 325 F.3d at 255 (holding that, "[t]hough one might argue ... that *Penry II* silently modifies *Penry I* and encroaches upon *Jurek,* such an act is expressly forbidden by *Teague*"). Although *Teague* does not directly apply to the instant proceeding, the State's interest in finality nonetheless outweighs Smith's interest in the retroactive application of any new rule of constitutional law.

CONCLUSION

For the foregoing reasons, Smith's petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 04-5323

IN THE
SUPREME COURT OF THE UNITED STATES

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

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I hereby certify that on the 10th day of September, 2004, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Jordan Steiker, Attorney at Law, 727 East Dean Keeton Street, Austin, Texas, 78705. All parties required to be served have been served. I am a member of the Bar of this Court.

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September 10, 2004

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Re: *Smith v. Texas*, No. 04-5323

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

EDWARD L. MARSHALL
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